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May 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 18, 2004**

Case No.: **TIA-0260**

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Applicant's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a machine operator and machine specialist at the Oak Ridge National Lab (the site). He worked at the site for approximately 19 years, intermittently from 1970 to 1989.

The Applicant filed an application with the OWA, requesting physician panel review of the Applicant's multiple sclerosis (MS) and hyperthyroidism. The Applicant claims that these conditions were due to exposures to toxic and hazardous materials during the course of the Applicant's employment. The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel stated the cause of MS is unknown. The Panel also stated that the mainstream medical and toxicological literature show no established association between MS and exposures to ionizing radiation or chemical toxins. See Physician's Panel Report at 1. In reference to the claimed hyperthyroidism, the Panel discussed possible exposures that could be linked to the condition, but the Panel did not find evidence of substantial

or prolonged exposures to which the Applicant's hyperthyroidism could plausibly be attributed. *Id.* at 2. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant disagrees with the Panel's determination and makes two arguments. First, the Applicant contends that it seems like more than an coincidence that he knows of several people who worked at the plant that have MS. Second, the Applicant asserts that since the Panel report states that hyperthyroidism is linked to toxic exposures, his workplace exposures could have caused that condition. *See* Applicant's Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's arguments do not indicate Panel error. The Panel is required to determine whether it is "at least as likely as not" that occupational exposures were a significant factor in the illness. The Applicant's contention that other employees have been diagnosed with MS does not mean that it is "at least as likely as not" that the occupational exposures were a significant factor in his illness. Similarly, the possibility that occupational exposures have not been ruled out as risk factors in hyperthyroidism does not mean that it is "at least as likely as not" that the Applicant's exposures were a significant factor in his hyperthyroidism.

As the foregoing indicates, the Applicant has not demonstrated Panel error and therefore, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-260, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2005